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Supreme Court, U.S.
FILED

No. 06147 2 MAY 1 - 2007

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNTIED STATES

CHRIS SWEENEY,

Petitioner,

v.

THE CITY OF NEW YORK,
THE NEW YORK CITY POLICE DEPARTMENT, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Chris Sweeney
P.O. Box 62, Rosebank Station
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Petitioner.

QUESTIONS PRESENTED

After Sept. 11, 2001, more and more local police officers have begun to carry out counter-terrorism related duties. Petitioner was one such police officer and performed with distinction. This Case presents questions of national importance concerning the post 9/11 lack of oversight of local law enforcement agencies: Petitioner seeks that the instant Case be remanded for factual development. Included herein are the nationally significant issues of defective counter-terrorism work performed by local law enforcement as well as local law enforcement's performing defective operations using nation-wide domestic wiretapping surveillance.

1) Should This Court exercise its supervisory power by remanding the instant Case for factual development to reconcile in a transparent manner the contradictory position of Respondent Police Department which used Petitioner for a period of four years in assignments that required Petitioner to conduct counter-terrorism interrogations and carry out long-term domestic wiretapping surveillance, yet all through those very years declaring him psychologically unfit based on anonymous sources whom Petitioner was never allowed to confront.

2) Should This Court allow Petitioner's Equal Protection claim, which involves excessive police force and the rendering of unequal police services to the non-English speaking community, to be factually developed according to the "generous provisions" of Federal discovery rules?

3) Should an involuntarily terminated police officer be forced to endorse untrue disability claims and impugn testimony made while a law enforcement officer in order to obtain benefits?

PARTIES TO THE PROCEEDING

Chris Sweeney, Petitioner;

The City of New York; The New York City Police Department; Raymond W. Kelly; Harry J. Wedin; Arthur Knour; Alice Steiner, Respondents.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment below.

OPINIONS BELOW

The unpublished Summary Order of the Second Circuit Court of Appeals; Order denying Motion; Order of the District Court; Report and Recommendation of the Magistrate.

JURISDICTION

Summary Order of the Court of Appeals, dated June 19, 2006; Order denying petition for rehearing en banc, dated Dec. 7, 2006; Order denying Motion, dated Dec. 21, 2006.

Order, dated Feb. 12, 2007, granting an extension of time to file petition for a writ of certiorari to, and including May 7, 2007 (Application No. 06A780). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law;".

42 U.S.C Section 1983.
42 U.S.C Section 1985.

STATEMENT OF THE CASE

This Case presents questions of national importance regarding the post 9/11 lack of oversight of local law enforcement agencies. Such 9/11 related issues pertaining to local law enforcement's performing defective counter-terrorism work along with defective work using nation-wide domestic wiretapping surveillance in the years after Sept. 11, 2001 are fundamental in nature and stand on their own regardless of Respondent Police Department's illicit motives in the instant Case.

This Case illustrates how in the Federal Courts-- even in a post 9/11 environment-- sensitive law enforcement work performed by police officers who years earlier had been declared by the very same police department to "twist and misperceive events" and "seriously distort information" can escape judicial notice. The manner in which the Courts below avoided this issue represents a far departure from an accepted course of judicial proceedings-- especially when applying a post 9/11 standard of review.

Petitioner seeks that the instant Case be remanded and factual development ordered[1].

Review of this Case will serve the national interest by developing a transparent record which comprehensively documents how in a post 9/11 environment a major local law enforcement agency could over the course of years knowingly

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1 Without any factual development or judicial notice of critical law enforcement duties performed, this Case was dismissed by U.S.D.J. Jed Rakoff for "failure to state a claim," citing inadequate pleadings prepared by Petitioner's lawyer, Mr. Sheldon S. Leffler. While the Case was still before Hon. Rakoff, Mr. Leffler, who was a former law partner of the Hon. Rakoff, was convicted of multiple felonies and disbarred.

use personnel that th[illegible]ready deemed psychologically unfit. Related questions concern local law enforcement's application of lower standards in the handling of counter-terrorism and other intelligence obtained from non-English speaking sources.

Petitioner's Equal Protection Claim serves as a framework to present broad questions concerning local law enforcement's providing inferior police services to non-English speaking communities and its willingness to protect officers that use excessive force against members of such community.

This Case presents fundamental due process questions about not being able to confront one's accusers in a psychologically based termination.

The question of forcing an involuntarily terminated employee to endorse documentation asserting untrue disability claims in order to receive benefits appears to be a question that is in need of a comprehensive analysis and a definitive ruling. Respondents did not cite any case law on this issue whatsoever and the Courts below ruled the matter moot.

FROM 1999 THROUGH 2003 ALL THE WHILE THE NYPD WAS DECLARING PETITIONER TO BE PSYCHOLOGICALLY UNFIT, SAID NYPD WAS DIRECTING PETITIONER TO CARRY OUT SENSITIVE LAW ENFORCEMENT DUTIES INVOLVING COUNTER-TERRORISM AND THE USE OF NATIONWIDE DOMESTIC WIRETAPPING SURVEILLANCE:

In Oct. 1999, Petitioner was declared a psychologically unfit Police Officer upon his refusal to sign a false confession

statement[2] proffered by the Commanding Officer of an NYPD arrest and summons unit to which he had been temporarily assigned. Just prior, said Commander denied Petitioner a transfer for the stated and illegal reason that Petitioner's "arrest and summons activity has been below par."[3] (Transfer denial attached to Complaint; *also* Appellant's Appendix, Ex. E).

The psychological interrogations were commingled with the Commander's attempts to get Petitioner to sign the false confession. In Oct. 1999 Petitioner was deemed to be an unfit police officer who "twists and misperceives events" and "seriously distorts information." From Oct. 1999 through Petitioner's termination in Oct. 2003, the NYPD at all times declared Petitioner to be unfit. Nevertheless, from the same Oct. 1999 right up to his termination in Oct. 2003 the NYPD continually directed Petitioner to perform not only the essential police duties, but sensitive counter-terrorism and wiretapping assignments. Many of such assignments Petitioner conducted solely in the Russian language. Over the course of these four years Petitioner carried out such assignments without any monitoring and in many cases without any direct supervision (Appellant's Brief, p. 16).

During this critical period (1999-2003) **after** Petitioner had been declared psychologically unfit, Petitioner's many other law enforcement duties included investigating domestic violence cases. Most of such investigations were conducted by

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2 The false confession was in regards to Petitioner's allegedly not throwing trash quickly enough into a New York City Department of Sanitation truck.

3 The NYPD Psychological Evaluation Unit went to great lengths to attribute "below par" arrest and summons activity to purported character defects in Petitioner and not to an illegal NYPD arrest and summons quota system.

Petitioner solely in the Russian language, and many involved the welfare of minor children (Appellant's Brief, p.9).

Shortly after Sept. 11, 2001, the City of New York constructed a clandestine, counter-terrorism facility in Brooklyn, New York. The counter terrorism unit based there frequently summoned Petitioner to conduct interrogations of individuals proffering information on suspected terrorist activities. Some of the interrogations Petitioner conducted were recorded at the clandestine location, others were not. On many occasions it was left up to Petitioner to conduct such Russian language interrogations completely unsupervised and simply report back what he felt about the proffered information (Appellant's Brief, p 9).

Petitioner was used so much by the NYPD Intelligence Division that he received a letter from NYPD Deputy Commissioner of Intelligence, David Cohen, dated September 23, 2002 (***see*** Amended Complaint., paragraph 21).

The letter stated:

> "You have recently been certified by the department as being proficient in a foreign language. In order to effectively utilize your talents, it is necessary for the Intelligence Division to be able to contact you as certain situations arise that require your expertise."

(Dated Sept. 23,2002)

The date of the letter, Sept. 23, 2002, is over a year **after** Sept. 11, 2001 and three years **after** Petitioner was deemed to be a psychologically unfit police officer in 1999.

Less than one week after receiving the Sept. 23, 2002 letter from the NYPD Intelligence Division, Petitioner was assigned to a long term investigation in which he had to use his "expertise" in the course of carrying out nationwide domestic electronic surveillance. Petitioner already had English and Russian language wiretapping experience: In Nov. 2000, a year **after** Petitioner was declared psychologically unfit by the NYPD, Petitioner was carrying out nationwide domestic wiretapping surveillance for the Manhattan District Attorney's Office. In that domestic electronic surveillance assignment, Petitioner was advised to pay special attention to intercepted communications that could expand leads on suspected smuggling and human trafficking emanating from parts of southern Russia and central Asia.

In Oct. 2002, as in Nov. 2000, Petitioner signed extensive "Minimization Instructions" which were integral to sealed domestic electronic surveillance warrants. The primary subjects of this domestic electronic surveillance operation were international criminals based in New York, New Jersey and Florida that collaborated with a variety of associates located in Uzbekistan and Azerbaijan-- countries that border Afghanistan and Iran respectively. From Oct. 2002 through April 2003, Petitioner was required to sign updated versions of the Minimization Instructions as the investigation developed. Petitioner's own memoranda were filed in the New York State Supreme Court in support of regular requests for the renewal of the wiretapping Warrants (Appellant's Brief, pp. 14-16).

From Oct. 2002 through April 2003, Petitioner intercepted thousands of calls. Regarding the Russian language calls, Petitioner was given authority to "stay up" on the lines as long as he felt was necessary due to interconnected criminal activity as well as complex code that was being used by those from central Asia.

While Petitioner was executing domestic wiretapping warrants, he was summoned to the NYPD Chief Surgeon's Office. The Chief Surgeon informed Petitioner that he was endorsing an NYPD psychological report, dated Feb. 2003, calling for his termination and that the Police Commissioner was to be notified in regards. When Petitioner informed the Chief Surgeon that he was in the middle of a long-term domestic wiretapping assignment, the Surgeon instructed Petitioner to return to the wiretapping operation and complete the assignment (Appellant's Brief, pp. 28-30).

In June 2003, Petitioner received a copy of the Feb. 2003 NYPD psychological report. The report was based on those same incidents surrounding the false confession, four years prior in 1999, and relied on anonymous sources, hearsay, innuendo and the use of attorney-client privileged material. The report states that Petitioner "twists and misperceives events" and "seriously distorts information." The theme of the report was to try to justify the grounds for the confession statement that Petitioner's then Commander and NYPD Psychologist tried to force Petitioner to sign four years prior in 1999.

On June 18, 2003, Petitioner went to U.S. District Court to attempt to enjoin said termination proceedings. Petitioner cited that during the entire period that the NYPD was declaring him to be an unfit police officer, i.e. from 1999 through 2003, the very NYPD was directing Petitioner to carry out sensitive law enforcement duties and that the psychological report was intentionally false. Petitioner could not confront any of his accusers, most of whom were anonymous. Further, Petitioner cited that he could not properly rebut the shocking allegations in the report by adequately and with specificity documenting his police work during this critical period since the wiretapping investigation

that he was assigned to from Oct. 2002 through April 2003 was still under State Supreme Court Seal.

The Motion for injunctive relief was denied by U.S.D.J. Jed Rakoff. On June 30, 2003 Petitioner was ordered to appear before a perfunctory medical board. Petitioner was not subject to any oath nor affirmation; he was not allowed to have representation. The appearance lasted all but a few minutes. There are no known minutes of said forced appearance and no known report.

Even after the instant Case was filed in U.S. District Court, and right up to his termination date, Petitioner continued to carry out law enforcement duties-- including effecting arrests (Appellant's Appendix, Ex. B). During this same time the NYPD Intelligence Division continued to summon Petitioner to conduct Russian language interrogations of individuals proffering information concerning suspected terrorist activities. In July 2003, Petitioner was summoned to the New York State Grand Jury in connection with felony arrests that he made that month **(Id.)**.

It is self evident that no police officer who has been declared psychologically unfit should be carrying out any law enforcement duties at all let alone sensitive assignments involving counter terrorism and domestic electronic surveillance. Respondents have been able to have things both ways: Respondents have terminated Petitioner for being unfit, but at all times availed themselves of his skills and "expertise" to perform law enforcement operations.

THE COURTS BELOW:

The Summary Order of June 19, 2006 conflicts with existing Opinions, including the precedential ruling of judge Weinfeld's three-judge District Court and Opinions of This

Court. The Summary Order itself illustrates how in a post 9/11 environment defective law enforcement performed at the local level can so easily go unnoticed and unaddressed.

An individual who reads any of the lower Court's decisions will have no idea that a major local law enforcement agency over the course of years was having officers that they deemed psychologically unfit carry out sensitive law enforcement duties--even well after Sept. 11, 2001.

The repeated denials of the lower Courts to take judicial notice of sensitive law enforcement work performed by Petitioner throughout the very same four-year period that NYPD was declaring him unfit represents--especially in a post 9/11 environment-- a far departure from an accepted and usual course of Judicial proceedings.

Before the Panel of the Court of Appeals, at oral argument, Petitioner raised the issue of counter-terrorism interrogations that he was performing at the same time that he was being declared unfit: The Panel did not ask Petitioner a single question regarding anything.

Petitioner's lawyer as well as Petitioner himself repeatedly raised the issue of sensitive police work, nevertheless no factual development was allowed by the lower Courts in spite of the "generous provisions of Federal discovery rules."

In spite of denying repeated requests for factual development concerning said sensitive police work performed by Petitioner between Oct. 1999 and Oct. 2003-- which marks the time when the intentionally malicious psychological report was being concocted and even the time after it was issued-- the Panel of the U.S. Court of Appeals in their Summary Order leads the reader astray by portraying such critical

ongoing police work as "past duties" (Summary Order, p.4(a)). Such portrayal of critical police work misleads the reader even more than Respondents themselves attempt to do in their Briefs.

In regards to the issue of a Police Officer who "seriously distorts information" and "twists and misperceives events" being required to carry out sensitive law enforcement duties, the United States Magistrate Judge stated, "while the doctors' reports and evaluations may have been ill-advised or even incorrect, they were **not shocking** (emphasis supplied),..." (Report and Recommendation, p. 15(a)).

The cases cited by Respondents in support of their Motion to dismiss pursuant to Rule 12(b)(6), as well as by the Courts below, have the common defect of being concerned with disciplinary discharges. In such cases, tenured public employees have an opportunity to confront accusers and examine the evidence brought against them. Petitioner was not terminated on disciplinary grounds and was not allowed to confront accusers.

The opportunity to confront accusers is fundamental, especially involving psychologically-based terminations:

> "...due process requires an adversarial hearing before the Board of Trustees before it may involuntarily retire a police officer based on *psychiatric* disability, is distinguishable;" **Giordano v. City of New York,** 274 F.3d 740, 753, fn.7 (2nd Cir. 2001).

The Panel in its Summary Order, dated June 19, 2006, portrays "...a few brief minutes before the Medical Board..." as being an adversarial process (Summary Order, June 19, 2006).

Petitioner had no opportunity to confront his accusers--most of whom were anonymous; Petitioner was constrained in detailing with specificity his ongoing law enforcement duties, including his domestic wiretapping assignments connected to ongoing and still sealed criminal cases. Petitioner was not subject to any oath nor affirmation; he was not allowed to have representation; there are no known minutes of said forced appearance and no known report. There was no scrutiny of any of the law enforcement duties, including counter-terrorism assignments and arrests, that Petitioner carried out **subsequent** to his forced appearance before perfunctory Medical Board in June 2003.

Such conditions on their face are in conflict with the ruling of This Court in **Armstrong v. Manzo**, 380 U.S. 545, 552. which held that the elements for a hearing in an "meaningful manner" must be present.

In the instant Case no such elements for a hearing in a "meaningful manner" were present. The lower Courts also repeatedly ignored the fact that Petitioner did not have the opportunity to confront his accusers. Such fundamental right in a psychologically-based termination is clearly articulated by Judge Weinfeld, writing for a three-Judge District Court in case of ***Snead***--a public employee terminated on psychologically-related grounds:

> " At the interview the employee is placed in the position of having to explain incidents charged by accusers he is not permitted to confront..." **Snead v. Dept. of Social Services** 355 F.Supp 764, 772.

In citing Locurto v. Safir , 264 F. 3d 154, 171 (2d Cir. 2001), the Courts below were flatly wrong. Locurto's

termination was strictly on disciplinary grounds. Locurto had an opportunity to confront his accusers and had an adversarial process. In the instant Case, Appellant was not terminated on disciplinary charges-- he in fact had an exemplary job performance record, and Petitioner could not confront his accusers.

"...(T)he government [has an] interest in the expeditious (emphasis supplied) removal of unsatisfactory employees and the avoidance of administrative burdens,..." **Mathews v. Eldridge,** 424 U.S. 319, 335 (1976). Here the government found nothing "unsatisfactory" with Appellant's job performance except that his "arrest and summons activity has been below par" while temporarily assigned to an NYPD summons unit some f-o-u-r years prior to the convening of the perfunctory Medical Board.

In the instant Case, instead of having an "interest" in Petitioner's "expeditious" removal, the NYPD kept Petitioner employed as a Police Officer for f-o-u-r years after they declared him psychologically unfit. During those four years, the NYPD aggressively used Petitioner to carry out sensitive law enforcement duties. The NYPD's acting completely contrary to the standard set forth by This Court in ***Mathews*** raises the question of national importance of unmonitored local law enforcement agencies retaining whom they themselves deem unfit personnel so as to utilize particular skills to carry out post 9/11- related law enforcement duties, including counter-terrorism interrogations and domestic electronic surveillance.

EQUAL PROTECTION:

Petitioner and his partner at the NYPD summons unit were similarly situated in that both Police Officers were being pressured to sign the exact same confession statement.

Petitioner did not sign said confession and challenged the Department's arrest and summons quota system: Petitioner was immediately declared psychologically unfit, and was ultimately terminated. Petitioner's partner signed the confession and conformed to the quota system: Petitioner's Partner subsequently received preferential treatment from the Department (Appellant's Brief, pp. 10-11).

Petitioner and his partner were also similarly situated in that they were both in positions that primarily serviced the non-English speaking community. Petitioner frequently received praise from the non-English speaking community as a result of his being attentive and accommodating (Appellant's Appendix, Ex. C).

Petitioner was terminated in spite of having excellent evaluations and never having been accused of using excessive force. Petitioner's partner, P.O. Gregory Serras, despite a long history of on and off-duty violence was protected by the NYPD: P.O. Serras was never sent for psychological evaluation. Even after a New York State Administrative Law Judge ruled that Police Officer Serras was "out of control" and "should not be trusted with a weapon", the NYPD allowed Officer Serras to retain his full compliment of police gear and remain on patrol (Appellant's Appendix, Ex. G, newspaper article "Fire Cop Who Beat Woman With Cuffs").

"Fire Cop Who Beat Woman With Cuffs"

> "Shut your Russian mouth," the cop [P.O. Serras] told her, she testified...
>
> At the entrance to the store, she testified, Officer Serras grabbed her hand and demanded her

> identification....Officer Serras grabbed her arm, pulling it behind her back, and struck her in the head with his handcuffs. Blood streamed down her face and she screamed.
>
> **Assaulted by Cop**
>
> She said the cop then kneed her in the stomach and she fell to the floor...
>
> One described the cop straddling Ms. Konstantinova 'like a horse' and raising the handcuffs over his head with both hands clenched and striking in the head 'with all his force' three times.
>
> OATH Administrative Law Judge Diedra L. Tompkins found the testimony of Ms. Konstantinova and four other civilian witnesses more credible than that of Officer Serras.
>
> Officer Serras' 'only excuse for inflicting this extreme force was to effect a questionable arrest of a middle-aged woman for the most minor of offenses,' she concluded in calling for his firing. The cop, she said, 'was out of control and his actions strongly suggest that he should not be trusted with a weapon.'
>
> The recommendation was forwarded to Police Commissioner Bernard B. Kerik, who has the final authority in determining disciplinary penalties."

(Excerpts from Appellant's Appendix, Ex. G)

Even after this article was published, Respondent NYPD presented P.O. Serras to be used against Petitioner and depicted P.O. Serras as a model Police Officer.

This widely published newspaper article about Petitioner's Partner's violent conduct directed towards members of the non-English speaking community juxtaposed with Petitioner's receiving frequent praise from such community (Appellant's Appendix, Ex. C) raises additional and very broad questions concerning the NYPD's policy of knowingly providing inferior services to the non-English speaking community.

ACCESS TO MONEYS AND BENEFITS WITHOUT ENDORSING UNTRUE CLAIMS:

Regardless of Respondent NYPD's motives in generating false "disability" pension documentation (*see* Motion to Show Cause, Oct. 20, 2005, p.3), the instant Case raises the broad, independent question of should a tenured police officer who was involuntarily terminated be forced to endorse untrue disability claims and impugn his testimony while a law enforcement officer in order to access benefits. The intuitive answer to this question is No. No tenured employee who is involuntarily terminated should be forced to endorse any type of bogus disability in order to receive moneys and benefits:

After Petitioner's involuntary termination, the basis of which he has always contested, Respondents unilaterally began issuing "disability" coded checks and reporting such payments to the IRS in spite of Petitioner never filling out any of the extensive "disability" pension application documentation. The moneys are continually accumulating and now exceed $70,000, but are frozen in an account set up by Respondents in Petitioner's name.

Respondents' Reply Brief to the Federal Courts in regards to this far reaching issue contained no case law whatsoever (Appellees' Response to Appellant's Motion to Re-Label Checks, Nov. 3, 2005). Respondents only made the illogical statement that "...by negotiating those [disability] checks, Sweeney would not be admitting that he is disabled..." **(Id).**

Such illogical position taken by Respondents, a major municipality, combined with the fact that Respondents' Reply contained no case law whatsoever militates for This Court to exercise its supervisory power so there may be clarity on this issue. Further, in support of the need for a clear decision to be made on this issue is the questionable sworn testimony given before a New York State Administrative Law Judge by Respondents' witness, a major municipal pension fund executive.

Respondent's witness, Robert Sens-Castet, Deputy Executive Director of the Police Pension Fund repeatedly testified that an involuntarily terminated public employee is entitled to money even without filling out any application.

In Oct. 2004, said Deputy Executive Director testified under oath in response to Judge Beverly Diego's questions regarding the unilateral issuance of "disability" pension checks (New York State Department of Labor, Unemployment Insurance Division: Transcript, October 7, 2004, pp. 38-39):

(Judge Diego)

> Q. "All right--as precisely as you can-- what was the-- rationale offered by the -- Law Department why this had to be done?"

(Robert Sens-Castet, Deputy Executive Director of the Police Pension Fund)

> A. "Well the Law Department said assuming regardless of the fact whether a person does not want to process their paperwork for retirement by law they are entitled to a pension and even if they fail to sign the necessary paperwork and fill out the necessary paperwork that is not a reason for the Pension Fund to hold back payment to the disability--Officer to the pension so the Law Department directed that we should immediately issue a pension check for the retroactive months. The months that Mr.Sweeney was not issued a pension check cause he did not fill out the paperwork and didn't come down again to-- file and that he should be issued subsequent checks regardless of the fact whether he ever came in to file the paperwork or not."

Such repeated sworn testimony from such a high-ranking executive of a major municipal pension fund gives force to Petitioner's request for This Court to order factual development on this matter. Such actions of Respondents, as Judge Diego later remarked, are tantamount to forcing a "disability" pension on an involuntarily terminated employee. Simple logic dictates that one should not be forced to sign and endorse "disability" related pension documentation **after** the moneys and healthcare benefits have already been allotted-- and even reported to the IRS (***see*** Motion to Show Cause, Oct. 20, 2005, p.1).

The Administrative Law Judge awarded Petitioner full unemployment benefits and ruled that he did not apply for a disability pension (Appellant's Appendix, Ex. I). Despite such Nov. 16, 2004 ruling, as recent as April 2007 Respondent NYPD has attempted to pressure Petitioner to sign "disability" related documentation in order to get access to the moneys in the account.

REASONS FOR GRANTING THE PETITION

There can be no doubt that the use of Police Officers already deemed to be psychologically unfit to carry out law enforcement duties concerning counter terrorism and domestic electronic surveillance is an issue of national importance. On this point alone a complete factual record should be developed to chronicle how in a major local law enforcement agency in a post 9/11 environment such actions could go on for years. The transparent development of such facts alone will help reduce the probability that a major post 9/11- related law enforcement failure occurs as the result of defective work performed by a local law enforcement agency.

Petitioner was not allowed to confront his accusers. Petitioner was placed in a line and in a few minutes was rushed through a forced appearance before a perfunctory medical board which functioned nothing more than a rubber stamp. There is no known report issued in regards to such forced appearance. Judge Weinfeld's ruling in ***Snead***, upheld by this Court, explains why in psychologically based terminations, due process requires being able to confront accusers. Since the instant case involves 9/11 related law enforcement work, fully developing all the facts surrounding a psychologically-based termination of a Police Officer is made all the more important; consequently, the standard set by This Court in ***Armstrong*** of having a hearing in a "meaningful

manner" should be accorded particular significance in order to address the post 9/11 role of local law enforcement personnel.

This Case should be remanded for factual development.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

s/ Chris Sweeney

Chris Sweneey

Dated: April 27, 2007,
New York

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Staten Island, New York 10305

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APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STATE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 19th day of June, two thousand and six.

PRESENT:

HON. ROBERT D. SACK,
HON. ROBERT A. KATZMANN,
Circuit Judges,

HON. J. GARVAN MURTHA*,
District Judge.

CHRIS SWEENEY,

Plaintiff-Appellant,

- v -

THE CITY OF NEW YORK, THE

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* The Honorable J. Garvan Murtha, of the United States District Court for the District of Vermont, sitting by designation.

NEW YORK CITY POLICE DEPARTMENT, et al.,
No. 05-3726

Defendants-Appellees.

For Appellant: Chris Sweeney, pro-se, Staten Island, New York.

For Appellee: Janet L. Zaleon, Corporation Counsel of the City of New York (Michael A. Cardozo, Kristen M. Helmers, of Counsel) New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Jed S. Rakoff, Judge).

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED AND DECREED that the judgment be, and it hereby is, AFFIRMED.

Plaintiff-appellant Chris Sweeney appeals from a March 17, 2005 judgment of the district court adopting the decision of a magistrate judge (Ronald L. Ellis, Magistrate Judge) recommending that the court grant the defendants-Appellees' motion to dismiss. Sweeney argues that his discharge from the New York City Police Department violated his constitutional rights. We assume that the parties and counsel are familiar with the facts and the procedural history of this case, and the scope of the issues presented on appeal.

This Court reviews de novo a district court's dismissal pursuant to Fed. R. Civ. P. 12(b)(6), with all inferences drawn in favor of the nonmoving party. Moore v Paine Webber, Inc. 189 F.3d 165, 169 (2d Cir. 1999).

"Section 1983 imposes civil liability upon a party who 'under color [of law]...subjects, or causes to be subjected, any

citizen of the United States... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws....'" Ginsberg v. Healey Car & Truck Leasing, Inc., 189 F.3d 268, 271 (2d Cir. 1999)(quoting 42 U.S.C. §1983).

Sweeney filed his initial complaint on June 18, 2003. His claims accruing prior to June 18, 2000 are therefore time-barred. However, because Sweeney did not learn of the harm allegedly caused by the 1999 incidents until he was forced to retire in 2003, his section 1983 claim based on his forced retirement should not have been dismissed as untimely. See Washington v. County of Rockland, 373 F.3d 310, 317 (2d Cir. 2004) (a claim accrues when plaintiff knows or has reason to know of the harm). Nevertheless, because Sweeney failed to allege sufficient facts to support his claim that any of his constitutional rights had been violated, the district court properly dismissed his action for failing to state a claim.

"[P]rocedural due process is satisfied if the government provides notice and a limited opportunity to be heard prior to termination, so long as a full adversarial hearing is provided afterwards." Locurto v. Safir, 264 F.3d 154, 171 (2d Cir. 2001). Here Sweeney does not deny he was afforded an opportunity to be heard and even acknowledged in the affidavit attached to his complaint that he was "permitted to testify for a few brief minutes before that Medical Board in defense of [his] position and abilities." Am. Compl. Sweeney Aff. 6. Sweeney's testimony was therefore sufficient to "check against a mistake being made by ensuring there [we]re reasonable grounds to find the charges against [him] [we]re true and would support his termination." Id. at 173.

"Substantive due process protects individuals against government action that is arbitrary, conscience-shocking, or oppressive in a constitutional sense, but not against government action that is incorrect or ill-advised." Lowrance v Achtyl, 20 F.3d 529, 537 (2d Cir. 1994). Sweeney does not allege facts sufficient to support his claim that the defendants-appellees conspired to force him to retire by

falsifying the contents of his psychological evaluation. Even if Sweeney's claim that the psychologists failed to acknowledge his past duties is true, he has failed to plead adequately that such failure was intentional. The district court therefore properly dismissed his substantive due process claim.

"It is an established principle of constitutional law that the Equal Protection Clause protects against class or group-based invidious discrimination." Muller v Costello, 187 F.3d 298, 309 (2d Cir. 1999). Because Sweeney's amended complaint did not allege any such discrimination, dismissal of his equal protection claim was appropriate.

We have considered Sweeney's other arguments and concluded that are without merit. For the foregoing reasons, the judgment of the district Court is hereby AFFIRMED.

FOR THE COURT:
ROSEANN B MACKECHNIE, Clerk

s/_____
By:

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHRIS SWEENEY,

Plaintiff

-against-

THE CITY OF NEW YORK, et al.,

Defendants

ORDER
03 Civ. (JSR)(RLE)

JED S. RAKOFF, U.S.D.J

On April 2, 2004, the Honorable Ronald L. Ellis, United States Magistrate Judge, issued a Report and Recommendation ("Report") in the above-captioned matter, in which plaintiff alleges that defendants violated his equal protection and due process rights during his employment with the New York City Police Department. Magistrate Judge Ellis recommended dismissal of the complaint in its entirety. Plaintiff timely filed objections to the Report, and the Court therefore reviewed the issues and record de novo. Having done so, the Court adopts Magistrate Ellis's thorough Report in its entirety and dismisses plaintiff's complaint for failure to state a claim, adding only a few words in summary.

Plaintiff, then pro se, filed an initial complaint that was defective on its face. After plaintiff secured counsel, the able Magistrate, in an excess of liberality, permitted him to file an Amended complaint. However, that Amended Complaint did not cure the problem, for the reasons well stated by Magistrate

Judge Ellis in his Report. Most of plaintiff's objections are to the effect that the Magistrate should have considered evidence will beyond the pleadings, or in the alternative should have directed plaintiff to file a Second Amended complaint that included such allegations. However, there is no indication that plaintiff ever asked permission to make such a filing. Accordingly, the Amended Complaint is dismissed with prejudice. Clerk to enter judgment.

SO ORDERED.

s/_____
JED. S RAKOFF, U.S.D.J.

Dated: New York, New York
March 9, 2005

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHRIS SWEENEY,

Plaintiff

-against-

THE CITY OF NEW YORK, et al.,

Defendants

REPORT AND RECOMMENDATION
03 Civ. (JSR)(RLE)

To the HONORABLE JED S. RAKOFF, U.S.D.J:

I. INTRODUCTION

Plaintiff Chris Sweeney ("Sweeney") brings this action pursuant to 42 U.S.C. §§1983 and 1985 alleging that defendants violated his equal protection and due process rights during his employment with the New York City Police Department ("NYPD"). Defendants City of New York ('the City); NYPD; Commissioner Raymond Kelly ("Commissioner Kelly"); Harry Wedin ("Wedin"); Arthur Knour ("Dr. Knour"), Director of NYPD's Psychological Evaluation Unit ("PEU"); and Alice Steiner ("Dr. Steiner") (collectively, "defendants") move to dismiss the amended complaint pursuant to Federal Rules of Civil Procedure ("Rule") 12(b)(6). For the reasons set forth below, I recommend that defendants' motion be GRANTED.

II. BACKGROUND

A. Factual History

Sweeney was hired as a police officer with the NYPD on April 15, 1997. *See* Memorandum of Law in Support of Defendants' Motion to Dismiss the Amended Complaint ("Def. Mem.") at 3. From July 1998 to May 1999, Sweeney was assigned to the 60th Precinct. *See* Amended Complaint ("Am. Compl").

1. Disciplinary Charges

From May to December 1999, Sweeney was assigned to the Tracer Unit of the 67th Precinct. Id. 12. Sometime in September 1999, Sweeney was ordered to help load a garbage truck. Declaration of Assistant Corporation Counsel Michael DeLarco in Support of Defendants' Motion to Dismiss the Amended Complaint ("DeLarco Decl.") Exh. C. He failed to properly carry out the order, and was charged with a command discipline. See Id. 22, 26. After an administrative hearing of October 5, 2000, the Assistant Deputy Commissioner of Trials found Sweeney guilty and penalized him with forfeiture of ten vacation days. *See* Def. Mem. at 3-4.

2. Organized Crime Intelligence Division

In early August 1999, Sweeney was being considered for assignment to the elite NYPD Organized Crime Intelligence Division ("OCID"). *See* Am. Comp. 13. On August 4, 1999, Wedin, Sweeney's commanding officer at the time, did not recommend him for the position on the stated grounds that Sweeney needs "more experience in effectuating and processing arrests to become a more rounded police officer. Def. Mem.at 4 Sweeney did not receive the assignment. Id.

3 Psychological Evaluation Unit and Ordinary Disability Retirement

On October 8, 1999, Wedin referred Sweeney to Dr. Steiner, a psychologist in the PEU, for a psychological evaluation. Id. On October 13, 1999, Sweeney was placed on restricted duty status. Id. at 4-5. On February 5,2003 after performing a psychological evaluation of Sweeney and finding him psychologically unsuitable to carry a firearm or perform

full duty police work, Dr. Steiner submitted her findings to Dr. Knour. Id. at 5; *see also* DeLarco Decl., Exh C 13. Dr. Knour affirmed Dr. Steiner's findings, and forwarded the evaluation to the NYPD's Article II medical board for determination as to whether Sweeney could perform as a full duty police officer or should be retired. Def. Mem. at 5. Sweeney appeared and testified before the board. Id. On October 8, 2003, the NYPD's board of trustees met and approved an ordinary disability retirement for Sweeney. Id.

B. Procedural History

On June 18, 2003, Sweeney filed his original complaint in this case. Def. Mem. at 6. He also filed an order to show cause, seeking a temporary restraining order enjoining defendants from convening the Article II medical board while the action was pending. Id. On June 24, 2003 Judge Rakoff denied Sweeney's request. Id. On September 3, 2003, Sweeney filed an amended complaint, and named Commissioner Kelly in his official and personal capacities, but named Wedin, Dr. Knour, and Dr. Steiner, only in their official capacities. Id. Sweeney admittedly failed to file a notice of claim prior to commencing this action. *See* Plaintiff's Memorandum in Opposition to the Motion to Dismiss the Amended Complaint ("Pl. Mem.") at 21; N.Y. Gen. Mun. L §§ 50-e, 50-i (in tort actions against a municipality, a notice of claim shall be filed within ninety days after the claim arises). On October 16, 2003 Sweeney filed a second order to show cause, seeking an order enjoining defendants from termination and/or retiring him on ordinary disability. Def. Mem at 5. On October 20 2003 Judge Rakoff denied his request. Id.

Sweeney's amended complaint asserts the following claims: (1) violation of due process under § 1983; (2) violation of equal protection under § 1983; (3) Monell claim against Commissioner Kelly under § 1983; (4) conspiracy under § 1985; and (5) negligence under New York law. *See* Am. Compl. at 7-8. Defendants argue that Sweeney's Amended Complaint should be entirely dismissed because

they are either time barred or fail to state claims upon which relief may be granted. Def. Mem. at 1-2.

III. ANALYSIS

A. Timeliness of Claims

In New York, a § 1983 action must be filed within three years of the date on which the plaintiff's cause of action accrues. Pearl v. City of Long Beach, 196 F.3d 76, 79 (2d Cir. 2002); Jaghory v New York State Dep't of Educ., 131 F.3d 326, 331 (2d Cir. 1997); Owens v Okure, 488 U.S. 235, 251 (1989). Because the original complaint was filed on June 18, 2003 only claims which arose since June 18, 2000 are timely for § 1983 purposes.

Sweeney does not dispute that three years is the correct statute of limitations period. Pl. Mem. at 5. Rather, he argues that there are reasons in this case that a claim based on acts occurring prior to June 18, 2000, should still be considered timely. Specifically, Sweeney asks the Court to apply a delayed accrual standard applicable in some actions against municipalities and individuals sued in their official capacities. *See* Branch v. Guilderland Central School Dist., 239 F. Supp. 2d 242, 249 (N.D.N.Y. 2003). Although a state's personal injury law dictates the statute of limitations for § 1983 claims, Lounsbury v Jeffries, 25 F.3d 131, 133 (2d Cir. 1994), federal law governs when the statute of limitations begins to run, i.e., when the cause of action "accrues." Branch, 239 F. Supp 2d at 249; Jaghory, 131 F.3d at 331. An action accrues "when the alleged conduct has caused the claimant harm and the claimant knows or has reason to know of the allegedly impermissible conduct and the resulting harm." Pena v Travis, et al., 2002 U.S. Dist. LEXIS 24709, 29 (S.D.N.Y. Dec. 27, 2002) (*citing* Duamutef v Morris 956 F. Supp. 1112, 1119 (S.D.N.Y. 1997)); *see also* M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221 (2d Cir. 2003) (*citing* Leon v Murphy, 988 F.2d 303, 309 (2d Cir. 1993)). Under a delayed accrual analysis, a cause of action against a municipality or an

individual sued in his or her official capacity does not necessarily accrue upon the occurrence of a harmful act, but only later when it is clear, or should be clear, that the harmful act is the consequence of a municipal "policy of custom." Pinaud v County of Suffolk, 52 F.3d 1139, 1157 (2d Cir. 1995) (*citing* Monell v Department of Social Services, 436 U.S. 658, 694 (1978)); Branch, 239 F Supp. 2d at 249.

Sweeney's argument is that defendants undertook a "wrongful, malicious, and unlawful campaign" to remove him from employment with the NYPD. Am. Compl. 25. Except for this ambiguous and conclusory statement, Sweeney's amended complaint is devoid of any sufficiently alleged facts to indicate that an official policy or custom by the City or its employees caused a violation of his rights. *See* Batista v Rodriguez, 702 F.2d 393, 397 (2d Cir. 1983) ("[a]bsent a showing of a causal link between an official policy or custom and the plaintiffs' injury, Monell prohibits a finding of liability against the City"). "the mere invocation of the 'pattern' or 'plan' [will] not suffice without this causal link." Id. (*quoting* Black v Stephens, 662 F.2d 181, 189 (3d Cir. 1981), cert. denied, 455 U.S. 1008 (1982) (*quoting* Lewis v. Hyland, 554 F.2d 93, 98 (3d Cir.), cert. denied 434 U.S. 931 (1977)). There is no basis to apply the delayed accrual method in this case.

Limitations periods are also subject to the doctrines of equitable tolling and equitable estoppel, both of which, when applicable, can salvage a plaintiff's otherwise time-barred §1983 claim. Branch, 239 F.Supp 2d at 250; *see* Young v. United States, 535 U.S. 43, 122 S. Ct. 1036, 1040, 152 L. Ed. 2d 79 (2002) (equitable tolling); Leon, 988 F.2d at 310 (equitable estoppel); *see also* Dillman v. Combustion Engineering, Inc., 784 F2.d 57, 61 (2d Cir. 1986) (explains distinction between equitable tolling and equitable estoppel). The two doctrines place blame for untimely filings on the defendants. Branch, 239 F.Supp 2d at 250; *see* Redlich v. Albany Law School of Union Univ., 899 F.Supp. 100,104 (N.D.N.Y. 1999). Under the doctrine of equitable tolling, "a

statute of limitations does not run against a plaintiff who is unaware of his cause of action" because of the defendant's conduct, i.e., fraudulent concealment. Cerbone v. international Ladies' Garment Workers' Union, 768 F.2d 45, 48 (2d Cir. 1985). Under equitable estoppel, a plaintiff knows the course of action, yet delays bringing suit because of a reasonable reliance on the defendant's misrepresentation of fact. Buttry v General Signal Corp., 68 F.3d 1488 (2d Cir. 1995). Sweeney does not appear to claim either doctrine is applicable here, nor does he indicate that there is any evidence in support of either claim. The Court will therefore consider only those portions, if any, of Sweeney's amended complaint that involve actions occurring on or after June 18, 2000.

B. Standards Under Rule 12(b)(6)

A 12(b)(6) motion should be granted "only where it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him to relief." Scotto v Almenas, 143 F3.d 105, 109-10 (2d Cir. 1998) (*quoting* Branham v Meachum, 77 F3.d 626, 628 (2d Cir. 1996)). At the motion to dismiss stage, the issue "is not whether a plaintiff is likely to prevail ultimately, but whether the claimant is entitled to offer evidence to support the claims. Indeed, it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." Pena, 2002 U.S. Dist. LEXIS 24709, 18 (*citing* Phelps v Kapnolas, 308 F.3d 108 (2d Cir. 2002)) (*quoting* Chance v Armstrong, 143 F.3d 698, 701 (2d Cir. 1998)). The task of the court in ruling on a Rule 12(b)(6) motion is "merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." Pierce v Marano, 2002 U.S. dist. LEXIS 14870, 11(S.D.N.Y. Aug. 13, 2002)).

When deciding a motion to dismiss pursuant to Rule 12(b)(6), courts must accept all factual allegations in the complaint as true, and draw all reasonable inferences in plaintiff's favor. Chambers v. Time Warner, Inc. 282 F.3d

147, 152 (2d Cir. 2002). Courts may not consider matters outside the pleadings but may consider documents attached to the pleadings, documents referenced in the pleadings, or documents that are integral to the pleadings. *See* Id. at 152-53

C. Liability Under § 1983

In order to establish a cause of action under 42 U.S.C. § 1983, Sweeney must show that: (1) the conduct complained of was committed by an individual acting under the color of state law; and (2) that the conduct deprived him of his rights, privileges or immunities secured by the Constitution. Pitchell v Callan, 13 F.3d 545, 547 (2d Cir. 1994). Defendants concede that at all relevant times they were acting in their respective capacities as employees of the NYPD. *See* Def. Mem. at 7. Therefore, the only issue before the Court is whether Sweeney has sufficiently alleged a deprivation of his constitutional rights. *See* Daniels v. Williams, 474 U.S. 327, 331-32 (1986).

1. Due Process

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of liberty or property without due process of law..." Due process has both a procedural and substantive component. *See* Natale v Town of Ridgefield 170 F.3d 258, 262 (2d Cir. 1999). To state a due process violation, a plaintiff must first show that he has a property or liberty interest protected by the Constitution. Narumanchi v Board of Trustees, 850 F.2d 70, 72 (2d Cir. 1988). If a protected interest is identified, the Court must determine whether the defendant deprived the plaintiff or that interest without due process. Id.

When reviewing alleged procedural due process violations, the Supreme Court has distinguished between claims based on "established state procedures" and claims based on "random, unauthorized acts" by state employees. *See* Hudson v. Palmer, 468 U.S. 517, 532 (1984); Hellenic American Neighborhood Action Committee ("HANAC") v. City of New York, et al., 101 F.3d 877, 880 (2d Cir 1996)

Sweeney argues that the procedural due process violation was "entirely based on state procedures." Pl. Mem. at 9. The procedures he complains about are Wedin's refusal to recommend him for the OCID position, the disciplinary charges brought in the garbage truck incident, his referral to PEU, and his alleged forced retirement. Id. According to Sweeney, these acts "may have all conformed to established state procedures." Id.

Sweeney's claims fail because: (1) the first three actions occurred prior to June 18, 2000, and are therefore outside the statute of limitations; and (2) the fourth action is not in the amended complaint. Lorentzen v. Curtiss, et al., 18 F.Supp.2d 322 328 (S.D.N.Y. 1998)(*quoting* O'Brien v. National Property Analysts Partners, 719 F.Supp. 222, 229 (S.D.N.Y. 1989) ("It is axiomatic that the Complaint cannot be amended by the briefs in opposition to a motion to dismiss.") Because the amended complaint alleges no timely facts to support a procedural due process claim, such a claim should be DENIED.

The Second Circuit has held that "substantive due process protects against government action that is arbitrary, conscience-shocking, or oppressive in a constitutional sense, but not against government action that is incorrect or ill-advised." Kaluczky v City of White Plains, 57 F.3d 202, 211 (2d Cir. 1995). To state a claim of denial of substantive due process in connection with the termination of public employment specifically, the employer's conduct must be shown to be arbitrary and intentionally abusive. McClary v O'Hare, 786 F.2d 83, 88 (2d Cir. 1986).

Even assuming that Sweeney has sufficiently alleged the existence of a property or liberty interest, the amended complaint is devoid of any alleged act that rises to the level of conscience-shocking, arbitrary, or intentionally abusive conduct. Aside from the time-barred allegations mentioned previously, Sweeney's claim is based solely on ambiguous and conclusory allegations that Dr. Steiner and Dr. Knour filed

false psychological reports and evaluations. See Am Compl. 23, 25. While the doctors' reports and evaluations may have been ill-advised or even incorrect, they were not shocking, arbitrary or intentionally abusive. Thus, Sweeney's substantive due process claim should be DENIED.

2. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike." Curran v. Teacher's Retirement system of the City of New York, et. al. 2003 U.S. Dist LEXIS 13599, 7 (S.D.N.Y. July 28, 2003) (*quoting* Lawrence v. Texas, 123 S. Ct. 2472, 2484 (2003)) Courts in the Second Circuit have emphasized that the first element, proof that the plaintiff has been treated differently from others similarly situated, remains an essential component of such a claim. *See* Brown v. City of Oneonta, 195 F.3d 111, 119 (2d Cir. 1999).

Sweeney's equal protection claim is based entirely on the following allegation: "the defendants, and each of them, so wantonly, recklessly, negligently, and improperly administered the NYPD so as to violate plaintiff's rights under the...Equal Protection Clause of the 14th Amendment to the U.S. Constitution." Am. Compl. 29. His amended complaint fails to allege or identify a single similarly situated police officer who was treated differently. In the absence of any such factual allegations, his equal protection claim should be DENIED.

3. Monell Claim

To hold a municipal entity liable under § 1983 for the unconstitutional acts of its employees, the plaintiff must plead and prove that his constitutional rights were violated, that the alleged actions by the employees were the result of an official policy, custom, or practice of the municipal defendant, and that the policy, custom, or practice caused the plaintiff's alleged injuries. Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 690-95 (1978). The Supreme Court has

identified at least two situations that constitute a municipal policy: (1) where there is an officially promulgated policy as that term is generally understood (i.e., a formal act by the municipality's governing body), *see* Id. at 690, and (2) where a single act is taken by a municipal employee, who, as a matter of state law, has final policymaking authority in the area in which the action was taken. *See* Pembaur v. City of Cincihnnati, 475 U.S. 469, 479-81 (1986); *see also* Davis v City of New York, 228 F.supp. 2d 327, 336-67 (S.D.N.Y. 2002). Alternatively, a custom may be demonstrated where an act was so widespread as to have the force of law, even if that act was not approved by an official policymaker. *See* Id. at 337. The mere assertion that a municipality has such a "policy or custom" is insufficient in the absence of allegations of fact tending to support, at least circumstantially, such an inference. *See* Maxwell v. City of New York, 272 F.Supp.2d 285, 303 (S.D.N.Y. 2003).

Sweeney seeks to establish his Monell claim by naming Commissioner Kelly as a defendant in both his official and individual capacities. *See* Am. Compl 38. Specifically, Sweeney alleges that Commissioner Kelly "is liable for compensatory and punitive damages to plaintiff under the doctrine of respondent superior for the intentional torts of each and every other one of the defendants committed within the scope of their employment." Id. Naming a government official in his official capacity is the equivalent of naming the government entity itself as the defendant, and requires the plaintiff to set forth Monell- type proof of an official policy or custom. *See* Rodriguez v. Phillips, 66 F.3d 470, 482 (2d Cir. 1995). As a threshold matter, however, Commissioner Kelly must be personally involved in the alleged unconstitutional acts. *See* Sealy v. Giltner, 116 F.3d 47, 51-2 (2d Cir. 1997). To establish personal involvement, Sweeney would have to show that Commissioner Kelly: (1) directly participated in the unconstitutional act; (2) failed to remedy the wrong after learning of it; (3) created a policy or

custom under which the alleged violation occurred; or (4) was grossly negligent in monitoring his subordinates. Id. Because Sweeney has failed even to make sufficient allegations of personal involvement by Commissioner Kelly, or to identify a specific policy or custom, his Monell claim should be DENIED.

D. § 1985 Claim

Sweeney also alleges a claim of conspiracy to deprive him of his constitutional rights, in volition of § 1985. Section 1985(3) prohibits conspiracies that are intended to deprive "either directly of indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." To recover under § 1985(3), a plaintiff must allege "some racial, or perhaps otherwise class-based, invidious discriminatory animus behind the conspirators' action." Griffin v. Breckenridge, 403 U.S. 88, 102 (1971). Sweeney alleges that defendants "continue to engage in a wrongful conspiracy to remove [him] from the NYPD... solely due to personal animus..."*See* Am. Compl. 27. The amended complaint is devoid of any allegation that the alleged conspiracy was undertaken with any racial or class-based animus. *See* Gagliardi v. The Village of Pawling, et. al,. 18 F.3d 188. 194 (2d Cir. 1994). Thus, Sweeney's § 1985 claim should be DENIED.

E. State Law Negligence Claim

When a federal court hears a federal question or diversity claim, it may exercise supplemental jurisdiction over state law claims that arise under the same "case or controversy." 28 U.S.C. § 1367(a). However, if the jurisdictionally sufficient claim is dismissed at any point during the litigation, the court in its discretion may decline to retain jurisdiction over the remaining state law claims. *See* 28 U.S.C. § 1367(c)(3); *see also* United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1966).

Each of Sweeney's federal claims- including his § 1983 procedural and substantive due process, equal protection,

Monell and § 1985 claims- should be denied, and the Court should decline jurisdiction over the remaining state law claim. *See* Historical Truth Prods., Inc. v. Sony Pictures Entertainment, et. al., 1995 U.S. Dist. LEXIS 17477, 36 (S.D.N.Y Nov. 21, 1995). For the reasons articulated above, I recommend that defendants' motion to dismiss be GRANTED.

IV. CONCLUSION

Pursuant to Rule 72, Federal Rules of Civil Procedure, the parties shall have ten (10) days after being served with a copy of the recommended disposition to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of the Court and served on all adversaries, with extra copies delivered to the chambers of the Honorable Laura Taylor Swain, 40 Centre Street, Room 426, and to the chambers of the undersigned, 500 Pearl Street, Room 1970. Failure to file timely objections shall constitute a waiver of those objections both in the District Court and on later appeal to the United States Court of Appeals. *See* Thomas. Arn 474 U.S. 140, 150 (1985); Small v Secretary of Health and Human Services, 892 F.2d 15, 16 (2d Cir. 1989) (*per curiam*); 28 U.S.C. § 636(b)(1) (West Supp. 1995); Fed. R. Civ. P. 72, 6(a), 6(e).

DATED: April 2, 2004
New York, New York

Respectfully Submitted,
s/_____
The Honorable Ronald L Ellis
United States Magistrate Judge

Copies of this Report and Recommendation were sent to:

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APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DANIEL PATRICK MOYNIHAN UNITED STATES COURTHOUSE
40 FOLEY SQUARE
NEW YORK 10007

THOMAS W. ASREEN
Acting Clerk

DEC 7, 2006

Date:

Docket No.	05-3726-cv
Short Title:	Sweeney v. City of New York
DC Docket Number:	03-cv-4410
DC:	SDNY(NEW YORK CITY)
DC Judge:	Honorable Jed Rakoff

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 7th day of DECEMBER two thousand six.

SWEENEY v. CITY OF NEW YORK

A petition for rehearing and a petition for rehearing en banc having been filed herein by the Appellant Chris Sweeney. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing en banc is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Thomas Asreen, Acting Clerk

By: s/_____
Motion Staff Attorney

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DANIEL PATRICK MOYNIHAN UNITED STATES COURTHOUSE
500 Pearl Street
New York, NY 10007

HON. DENNIS JACOBS
Chief Judge

THOMAS W. ASREEN
Acting Clerk

Before: Hon. Robert D. Sack,
Hon. Robert A. Katzmann,
Circuit Judges,
Hon. J. Garvan Murtha,*,
District Judge.

Docket No. 05-3726-cv

SWEENEY v. CITY OF NEW YORK

ORDER

IT IS HEREBY ORDERED that motion for "*en banc*" reconsideration of Order denying emergency motion to require Appellees to unconditionally release monies," and the motion for a "final decision on appellant's request to require Appellees to release moneys" are both DENIED as moot in light of Orders denying petition for rehearing and petition for rehearing *en banc.*

FOR THE COURT:
THOMAS W. ASREEN, Acting Clerk

by

s/_____
Tracy W. Young
Motions Staff Attorney

Dec 21, 2006
Date

* The Honorable J. Garvan Murtha, of the United States District Court for the District of Vermont, sitting by designation.

APPENDIX F

42 U.S.C. Section 1983:

" Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law suit in equity, or other proper proceeding for redress,..."

42 U.S.C. Section 1985:

" If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws;...the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators."